Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	

COMMENTS OF GTE SERVICE CORPORATION AND ITS AFFILIATED DOMESTIC TELEPHONE OPERATING COMPANIES IN RESPONSE TO SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

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TABLE OF CONTENTS

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	)	
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GTE Service Corporation and its affiliated domestic telephone operating companies[1] (collectively "GTE") respectfully submit their Comments in the above-captioned docket.

In the three years since the Telecommunications Act was passed, CLECs have raised $15-20 billion in capital that they have used to deploy hundreds of switches, thousands of miles of fiber for interoffice transport and local access, and facilities to provide every type of broadband service.[2] GTE's unique experience as an ILEC serving widely dispersed territories both large and small confirms that these investments are being made in every kind of market -- from Los

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[1] GTE Alaska Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., GTE West Coast Incorporated, and Contel of the South, Inc.

[2] *See* Comments of Association for Local Telecommunications Services, CC Docket No. 98-146, at 9 (filed Sept. 16, 1998). This figure does not include AT&T's $90 billion investment in cable-based local telephony. *See* Peter W. Huber & Evan T. Leo, UNE Fact Report III-19 (submitted by USTA on behalf of Ameritech, Bell Atlantic, BellSouth, GTE, SBC and U S WEST) ("UNE Fact Report").

Angeles to Oxford Junction, Iowa. These CLECs are already earning billions of dollars in revenues and, just with the facilities in place today, are poised to reach a significant percentage of the business *and* residential customers in every type of GTE market. Congress's pro-competitive vision for the local marketplace is rapidly becoming a reality. This proceeding offers the Commission the choice between ensuring that the pace of competition continues to grow or derailing the competitive process by destroying incentives for ILECs and CLECs alike to invest in new facilities.

INTRODUCTION AND SUMMARY

In *AT&T v. Iowa Utilities Board*, 119 S. Ct. 721 (1999), the Supreme Court vacated in its entirety the Commission's original unbundling rule, 47 C.F.R. § 51.319. The Court directed the Commission to go back to the drawing board and formulate new substantive standards for the "necessary" and "impair" requirements of section 251(d)(2) that will give those terms meaningful content consistent with the pro-competition purpose of the Telecommunications Act.

The Court held that the Commission's original Rule 319 was invalid because (1) the rule failed to take account of "the availability of elements outside the incumbent's network," (2) the Commission had improperly assumed that "any increase in cost (or decrease in quality) imposed by denial of a network element" requires the element to be unbundled, and (3) the original rule was based on the erroneous presumption that all network elements that could feasibly be unbundled should be unbundled under section 251(d)(2). *Iowa Utils. Bd.*, 119 S. Ct. at 735-36. The Court instructed the Commission to start over on remand and "determine on a rational basis

which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements." *Id.* at 736.

To fulfill the Court's mandate and give rational content to the terms of the Telecommunications Act, the Commission's unbundling standards must promote competition, which is the objective of section 251, and not merely the interests of would-be competitors. True competition depends upon innovation, and a reasonable unbundling rule will stimulate rather than stifle the incentives of CLECs and ILECs to invest in new facilities. As explained by Justice Breyer in his concurrence joining in and fleshing out the Court's "necessary and impair" holding, the Act requires the Commission to provide "a *convincing explanation* of why facilities should be shared (or 'unbundled') where a new entrant could *compete effectively* without the facility, or where *practical alternatives* to the facility are available." *Id.* at 753 (emphases added). "Increased sharing, by itself, does not automatically mean increased competition. It is in the *un*shared, not the shared, portions of the enterprise that meaningful competition would likely emerge." *Id.* at 754 (emphasis in original).

In light of these principles, GTE urges the Commission to adopt the following standards for implementing section 251(d)(2)'s unbundling requirements:

First, before any element is required to be unbundled, it must meet the "impair" test. Drawing upon firmly established principles of competition law, the Commission should rule that "the failure to provide access" to any particular network element would "impair" CLECs' ability to provide service within the meaning of section 251(d)(2)(B) ***only where the element is essential***

to competition and there is convincing evidence that CLECs cannot effectively compete using substitutes for the element available from alternative sources.

This test should not turn on an element-to-element cost comparison or any hypothetical model, but rather on the wealth of actual market evidence now available to the Commission concerning the availability of substitute facilities and the ability of CLECs to compete using those substitutes. The "convincing evidence" standard of proof is necessary to avoid overbroad or presumptive unbundling requirements that could diminish current facilities-based competition or impair existing incentives to invest in alternative facilities, and it is appropriate to place the burden of proof in this proceeding on CLECs who seek unbundled access, since they are uniquely well positioned to produce the relevant market evidence the Commission must consider. Furthermore, under well-accepted competition law principles, application of the standard to particular elements must be tailored to accommodate differences in the relevant geographic markets for each network element. For these reasons, it is not appropriate to adopt a presumptive list of UNEs and put the burden on ILECs to prove the availability of substitutes in particular areas, nor may the Commission adopt a single "one size fits all" national unbundling requirement that ignores relevant market differences.

Second, even where a network element satisfies the threshold "impair" standard (which is the prerequisite for any unbundling obligation), the Commission should rule that access to a feature, function or capability of the element that is "proprietary" in nature is not "necessary" within the meaning of section 251(d)(2)(A) ***unless the proprietary feature, function or capability is integral to the operation of the element such that CLECs cannot make use of the element***

without such access. This approach reflects the fact that few, if any, network elements are likely to be *entirely* proprietary in nature. Of course, if the Commission were to determine that the particular proprietary feature, function or capability in question itself constituted an entirely separate network element (as contemplated by the definition of "network element" in 47 U.S.C. § 153(29)) and that this separate element in its own right was essential to competition and met the "impair" test, such an element would almost certainly also meet the "necessary" test because the proprietary aspect would be inseparable from the entire element.

In any event, regardless of whether the Commission adopts the particular articulation of the "necessary" and "impair" standards proposed by GTE, the Commission's unbundling rule must take account of the explosion of investment in CLEC facilities that has occurred in the three years since the Commission last considered Rule 319. Whatever predictive judgments might have been made three years ago about the prospects for the development of facilities-based competition, those predictive judgments are now trumped by actual market experience. Clearly the Commission has the power to require CLECs to identify the facilities they use and the alternative facilities available to them from equipment vendors or other carriers. Any new unbundling rule unsupported by a systematic examination of such substitutes cannot pass muster under *Iowa Utilities Board*.

As we detail below in sections II-IV of these comments and in the accompanying appendices, since the passage of the Act, CLECs throughout the United States have deployed several hundred switches, laid thousands of miles of fiber for interoffice transport and local loops, and deployed myriad other competitive local exchange facilities. These investments have been

made largely because the Commission's UNE platform and recombination requirements have been stayed by the Eighth Circuit and because there has been uncertainty over whether ILECs will be required to provide elements at TELRIC prices. Competitive facilities, moreover, are found in markets of all sizes throughout GTE's local service territories. CLECs continue to announce further plans to deploy local exchange facilities in new markets on an almost daily basis and have no difficulty attracting capital to fund such strategies.

Since 1996, the number of CLECs has grown to more than 1000 -- an increase of 425 percent -- and these CLECs are experiencing rapid revenue growth. *See* Report of Network Engineering Consultants, Inc. at 1 & Exhibit A ("NECI Report") (filed herewith as Appendix B). To take one representative example, facilities-based Intermedia Communications saw its revenue grow from $38.6 million in 1995 to $712.8 million in 1998 -- an increase of over 1700 percent. *Id.* at 23. Moreover, in the last three years, these CLECs have rapidly deployed facilities in markets across the country. Before the Act was passed, CLECs operated only 65 switches. UNE Fact Report at I-1.[3] Since 1996, however, CLECs have deployed more than 600 new switches of their own. *Id.* Indeed, by March 1999, 167 different CLECs had deployed switches in 320 cities. *Id.* Likewise, since 1996, the number of CLECs that have deployed fiber networks has grown from 29 to 60 and the number of metropolitan areas served by this fiber has increased from 130 to 289. *Id.* at II-6. Within the top 50 MSAs competitors have deployed over 30,000 miles of fiber. *Id.* And in the MSAs ranked between 51 and 150, CLECs have deployed fiber in all

[3] To avoid unnecessary duplication and multiple filings, the UNE Fact Report is being filed by the USTA on behalf of all sponsoring companies. We ask the Commission to treat the Report as if it were filed as an appendix to GTE's comments.

but 15. *Id.* Sections III-IV of these comments systematically discuss the findings of the UNE Fact Report and the NECI Report with respect to individual network elements.

In addition, GTE has also commissioned PNR & Associates to conduct an in-depth examination of facilities-based competition in eight GTE markets of various sizes that are representative of GTE's local service territories -- Los Angeles; Dallas; Tampa; Fort Wayne, Indiana; Lexington, Kentucky; Myrtle Beach, South Carolina; Oxford Junction, Iowa; and LaBelle/Ewing/Lewistown, Missouri. *See* Report of PNR & Associates, Inc. ("PNR Report") (filed herewith as Appendix D). PNR has identified 26 separate facilities-based CLECs that are operating in these markets -- 17 in Los Angeles, 11 in Dallas, eight in Tampa, two in Fort Wayne, two in Lexington, and one each in the remaining small and rural markets. *Id.* at 10. The following chart lists these CLECs and identifies the network elements they are self-providing or acquiring from alternative wholesale suppliers:

CLECs OPERATING IN EIGHT GTE MARKETS						
CLEC	**Switching**	**Transport**	**Loops/NID**	**OSS**	**SS7**	**OS/DA**
Allegiance	✓	✓	*	✓	✓	*
AT&T	✓	✓	✓	✓	✓	✓
Cox Calif. Telecom	✓	✓	✓			*
e.spire	✓	✓	✓	✓	✓	*
Focal Comms.	✓	*	*			
Frontier	✓	✓	✓	✓	✓	✓
GST	✓	✓	✓		✓	*
HTC Comms.	✓	✓	✓	✓	✓	✓

CLECs OPERATING IN EIGHT GTE MARKETS						
CLEC	**Switching**	**Transport**	**Loops/NID**	**OSS**	**SS7**	**OS/DA**
Hyperion	✓	✓	✓			
ICG Communications	✓	✓	✓	✓	*	*
Intermedia	✓	✓	*	✓	*	*
KMC Telecom	✓	✓	✓			
Level 3	✓	✓	*			
Lost Nation-Elwood.	✓	✓	✓	✓	✓	✓
Mark Twain Comms.	✓	✓	✓	✓	✓	✓
MCI WorldCom	✓	✓	✓	✓	✓	✓
MGC Comms.	✓	✓	*			
MediaOne	✓	✓	✓			
NextLink	✓	✓	✓	✓	*	*
PacBell CLEC	✓	✓	*	✓	✓	✓
SBC	✓	✓	*	✓	✓	✓
Teligent	✓	✓	✓	✓	*	✓
Time Warner Telecom	✓	✓	✓			✓
US LEC	✓	✓	*		✓	
USXCHANGE	✓	✓	*	✓		
WinStar	✓	✓	✓	✓	*	*

✓- CLEC self-provides element in some or all markets.
* - CLEC leases element from ILEC or non-ILEC source.
Blank - information not available.

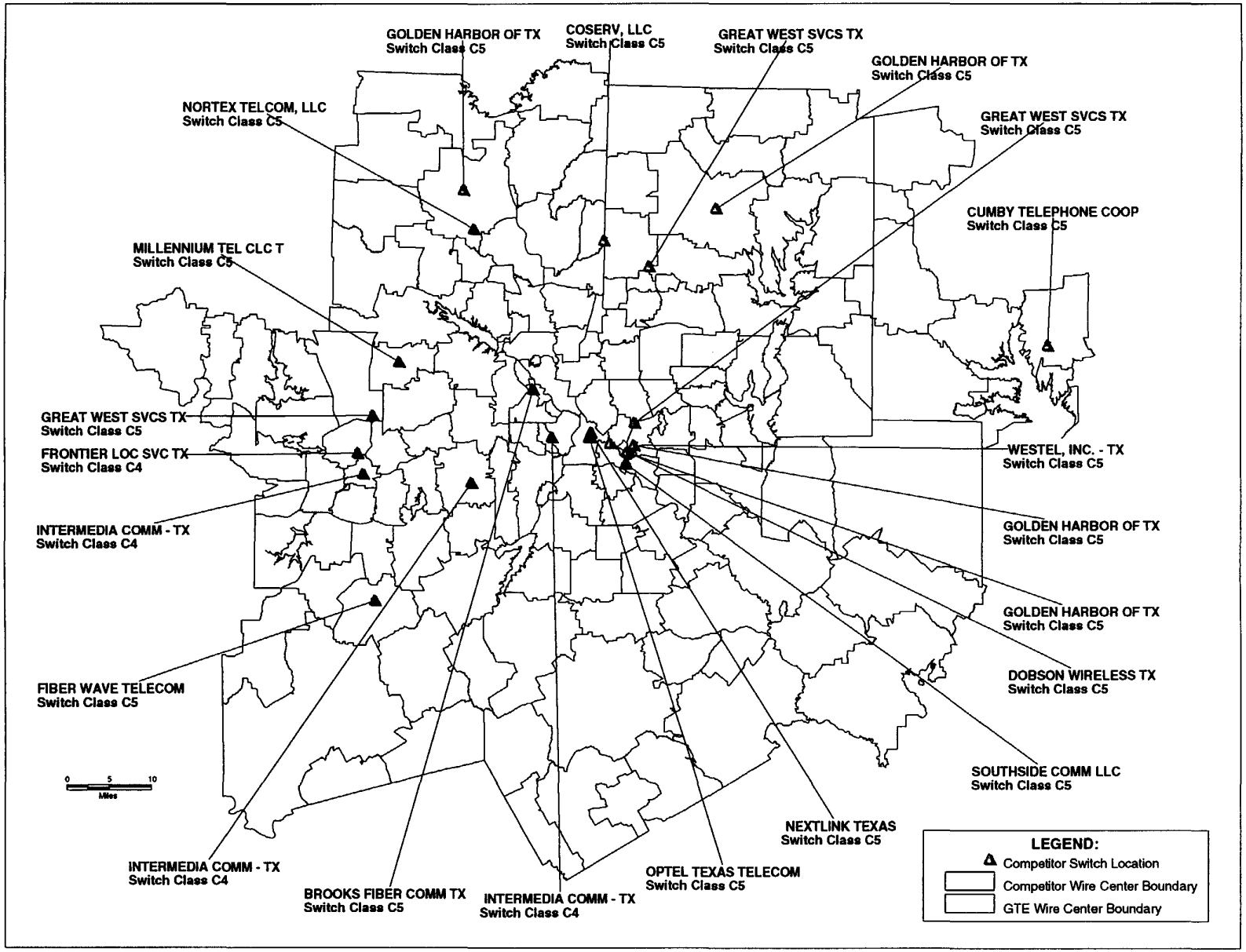
The PNR Report also summarizes in depth the current and prospective business cases of each of these CLECs based on the best available information. The PNR Report shows that these CLECs have raised tremendous amounts of capital investment, in some cases more than

$2 billion, and all have aggressive plans to expand their offerings on a broad scale without extensive dependence on GTE's unbundled network elements. The PNR Report also includes detailed maps of each of the eight focus markets that depict the locations of the switches and fiber facilities deployed by these CLECs. The three Dallas maps that follow this page are representative of the maps included in the PNR Report. These maps show that the 26 CLECs listed above operate switching and fiber facilities that are perfectly poised to reach the bulk of GTE's customers in each of these markets. As explained by PNR, the "addressable" market that could be served by the competitive facilities in place *today* in these areas encompasses virtually all of GTE's high-value customers and, in some instances, virtually *all of GTE's customers, period.* In the Dallas/Fort Worth area, for example, *over 97 percent of all of GTE's customers*, including both business and residential customers, are within 1,000 feet of a CLEC's fiber, and fully *91 percent* of all of GTE's business and residential customers are within 18,000 feet of a CLEC's switch. PNR Report at DFW Metroplex 4.

Recognizing the widespread availability of substitute elements actually used by CLECs in the market today, and based on a proper solicitude for the investment incentives of CLECs and ILECs alike, the Commission, in our view, should take the following actions with respect to particular elements:

> ***Switching, OS/DA Signaling and NIDs:*** These elements should not be subject to unbundling. CLECs have demonstrated an ability to deploy fully scalable switches in markets of all sizes throughout the country. OS/DA, signaling, and NIDs are available from competitive providers on a national basis.

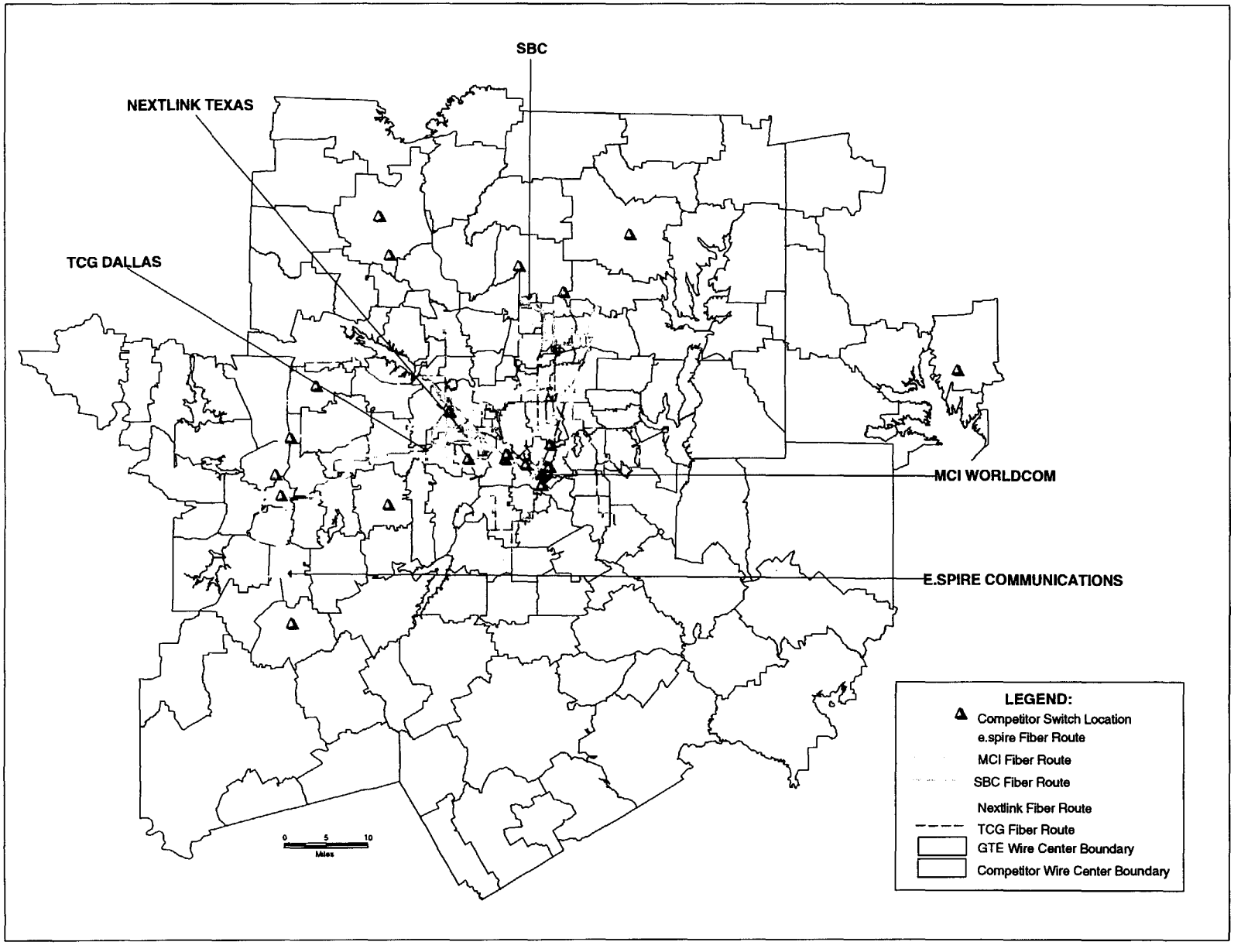
2.1 GTE Franchise Area - Dallas-Ft. Worth, Texas: CLEC Switch Deployment



PNR and Associates, May 1999

GTE Comments in CC Docket No. 96-98

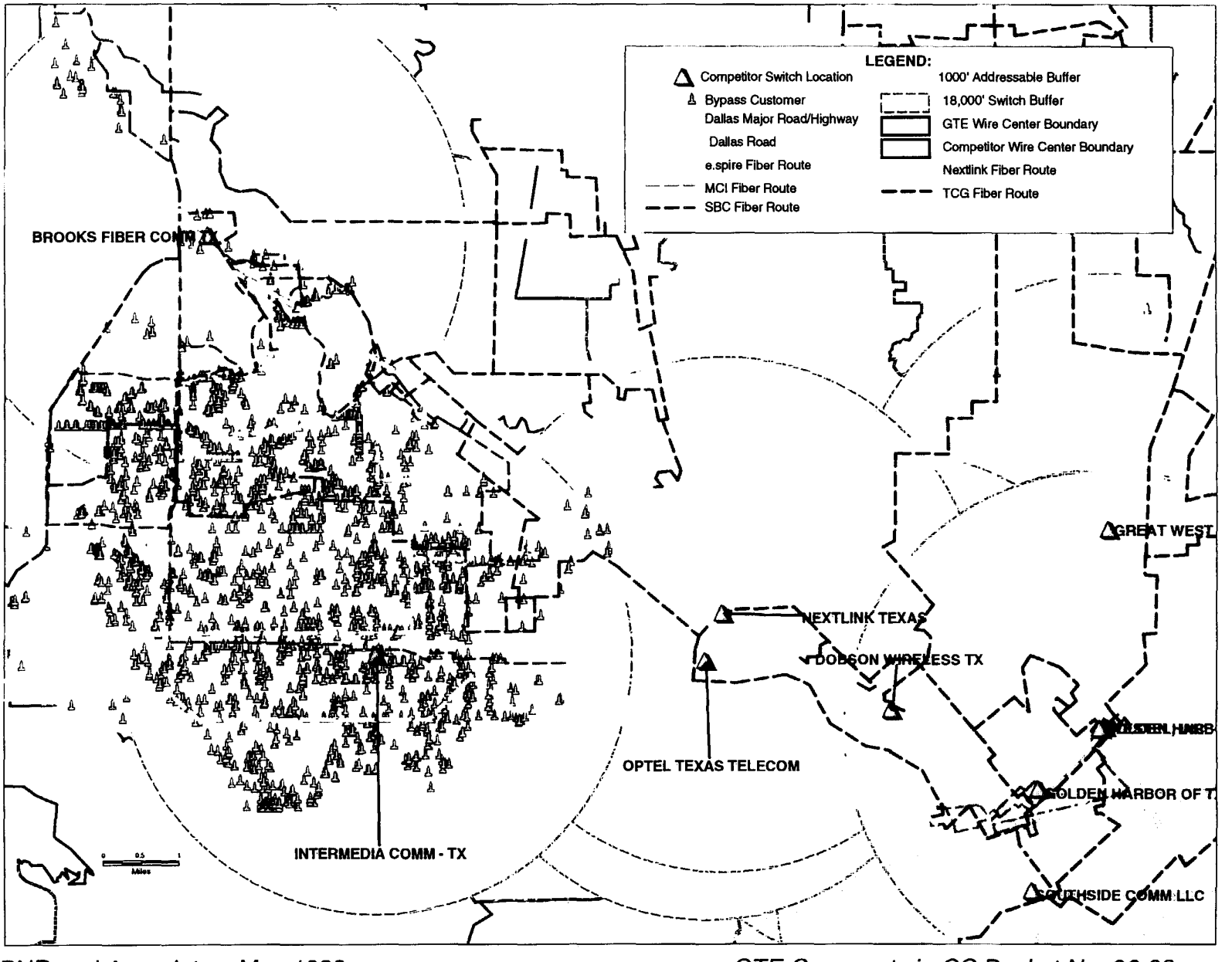
2.2 GTE Franchise Area - Dallas-Ft. Worth, Texas: CLEC Fiber Deployment



PNR and Associates, May 1999

GTE Comments in CC Docket No. 96-98

2.3 GTE Franchise Area - Dallas-Ft. Worth, Texas: CLEC Bypass Customers And Addressable Market In Irving/Los Colinas



PNR and Associates, May 1999

GTE Comments in CC Docket No. 96-98

Interoffice Transport: ILECs should not be required to unbundle transport to or from wire centers that serve 15,000 or more lines. In GTE's service territories, wire centers of this size have the greatest incidence of collocation, and collocation correlates almost perfectly with the use of transport alternatives by CLECs.

Loops: ILECs should not be required to unbundle local loops used to serve business customers with 20 or more access lines or multiple dwelling unit complexes ("MDUs"). Numerous CLECS are successfully serving these customers with their own loop facilities. Nor should ILECs be required to unbundle loops serving new residential or commercial developments that are installed after the effective date of the rules adopted in this proceeding. ILECs have no advantage over CLECs in deploying such new facilities.

OSS: ILECs should be required to unbundle OSS only where CLECs use the OSS in conjunction with another service or element of the ILEC.

Additional Network Elements: There is no basis for requiring unbundling of the additional elements cited in the present *Notice of Proposed Rulemaking*.[4] Some of them, such as inside wiring and dark fiber, are not network elements, and all of them are widely available in the marketplace from alternative sources and therefore do not meet the impair test.

Finally, whatever unbundling requirements the Commission adopts, it is imperative that these requirements sunset within a reasonable period of time, such as two years. Given the extraordinary dynamism and technological evolution of the telecommunications marketplace, it is a near certainty that elements that may now be appropriate candidates for unbundling will not be proper candidates in the near future. The Commission needs to monitor these developments and periodically reassess its unbundling obligations to ensure that they continue to satisfy the requirements established by section 251(d)(2) and serve the Act's procompetitive purpose.

For the convenience of the Commission, we are submitting at the end of these comments GTE's proposed rules for implementing the unbundling standards of section 251(d)(2).

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[4] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Second Further Notice of Proposed Rulemaking (Apr. 16, 1999).

DISCUSSION

I. THE LEGAL AND ECONOMIC STANDARDS THAT GOVERN UNBUNDLING OBLIGATIONS UNDER SECTION 251(d)(2).

Section 251(d)(2) provides that in determining "what network elements should be made available" under the Act's unbundling requirement, the Commission "shall consider, at a minimum, whether" --

> (A) access to such network elements as are proprietary in nature is necessary; and
>
> (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

Although the "necessary" standard of section 251(d)(2)(A) applies only to "proprietary" elements, the language of the Act makes it clear that all elements, proprietary or not, must meet the "impair" test of section 251(d)(2)(B) before the Commission may compel their unbundling. The phrase "such network elements" in section 251(d)(2)(B) plainly refers back to the general antecedent phrase "what network elements should be made available" in the opening sentence of section 251(d)(2). The statute thus requires application of the "impair" test generally to all elements to be unbundled.

Since all network elements must first meet the threshold "impair" test before the Commission can require them to be unbundled, and since the "necessary" test applies only to the subset of elements that involves a "proprietary" feature or functionality, we will first address the legal and economic principles that we believe govern the "impair" standard before turning to the

substance of the "necessary" test. We will then address various other questions and points raised by the Commission's *Notice of Proposed Rulemaking*.

A. The Supreme Court Instructed the Commission To Develop Unbundling Standards Informed By the Act's Purpose of Promoting Competition; Only Standards That Preserve Incentives To Invest in Competitive Facilities Meet That Objective.

The Supreme Court vacated the Commission's original unbundling rule after concluding that its requirement that ILECs unbundle every network element -- regardless of whether substitutes were available in the marketplace -- was "simply not in accord with the ordinary and fair meaning" of the Act. *Iowa Utils. Bd.*, 119 S. Ct. at 735.

In his opinion for the Court, Justice Scalia identified three specific deficiencies in the Commission's approach. *First*, contrary to the command of section 251(d)(2), the Commission had "blind[ed] itself to the availability of elements outside the incumbent's network." *Id.* The Court held that "*that failing alone would require the Commission's rule to be set aside.*" *Id.* (emphasis added). *Second*, the Commission had improperly assumed that "any increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element 'necessary,' and causes the failure to provide that element to 'impair' the entrant's ability to furnish its desired services." *Id.* *Third*, the Commission had improperly avoided making a substantive judgment about which network elements did or did not meet the "necessary" and "impair" tests by presuming, contrary to the terms of the Act, that all elements that could feasibly be unbundled should be unbundled under section 251(d)(2). *Id.* at 736. The Court thus rejected Rule 319's premise of "blanket access to incumbents' networks" and instructed the Commission

on remand to "determine on a rational basis which network elements must be made available" and, specifically, to base this determination on "the objectives of the Act." *Id.* at 735-36.

It is undisputed that the objective of section 251 is to promote competition. The part of the Act giving the Commission authority to establish ILEC unbundling obligations is entitled "Development of Competitive Markets."[5] The Act's preamble expressly states that its purpose is to "accelerate rapidly private sector deployment of advanced telecommunication and information technologies . . . by opening all telecommunications markets to competition." Pub. L. No. 104-104, 110 Stat. 56 (1996); H.R. Conf. Rep. No. 104-458, at 1 (1996). Similarly, the Supreme Court recognized that Congress sought, through the Act, to create "competition among multiple providers of local service." 119 S. Ct. at 726. And the Commission's present *Notice of Proposed Rulemaking* acknowledges that the Act's unbundling requirements are designed "to achiev[e] Congress' objective of promoting rapid competition in the local communications market." *Second Further Notice of Proposed Rulemaking* ¶ 2.[6]

Congress's express preference for the "deployment" by competitors of new "technologies" underscores the fact that genuine innovation in telecommunications markets depends on the ownership of facilities and thus on *facilities-based* competition, as opposed to mere resale. If the

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[5] Title of Part II of the Act, which includes section 251(d)(2); *see Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528-29 (1947) (title of statute is a relevant interpretative tool).

[6] *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, at ¶ 1 (1996) ("*First Report and Order*") (the Act's "new regulatory regime" requires the Commission to "affirmatively promote efficient competition").

incumbent achieved its position because it owns a unique facility or input critical to the provision of its service, competitors have a strong incentive to improve upon that input or find a way to provide the service with an alternative input. Making these investments gives competitors an opportunity to attract the incumbent's customers by providing better service at a lower price. This development provokes the incumbent to respond in kind, making its own investments to improve upon the service of its competitors. As Professor Kahn states, the "most creative and productive form of competition is innovation -- in the methods of producing and supplying existing products and services and in developing new product and service offerings." Declaration of Alfred E. Kahn at 4 (emphasis added) (filed herewith as Appendix A) ("Kahn Declaration").

B. Relevant Competition Law Principles Dictate that an Element Will Meet the "Impair" Test Only If It Is Essential to Competition and There Is Convincing Evidence That CLECs Cannot Effectively Compete Using Substitutes for the Element.

Congress's stated objective in section 251 of fostering competition should be interpreted in light of the pre-existing body of law embodying the Nation's competition policy -- federal antitrust law. It is well settled that Congress is "presumed to intend" the "judicially settled meaning" of terms or concepts used in a statute,[7] and that any reasonable method of statutory construction "must take into account" the "contemporary legal context" in which a statute is enacted.[8] Here, the relevant "legal context" is contemporary antitrust law.

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[7] *American Nat'l Red Cross v. S.G. & A.E.*, 505 U.S. 247, 252 (1992); *see also Traynor v. Turnage*, 485 U.S. 535, 546 (1988); *Director, Office of Workers Compensation Programs v. Perini North River Assoc.*, 459 U.S. 297, 319-20 (1983) (same).

[8] *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979); *see also id.* at 699 (Court presumes "that Congress was thoroughly familiar with . . . important precedents from [the

Within the body of federal competition law, the "essential facilities" doctrine is the only relevant line of authority analogous to section 251(d)(2) under which an incumbent firm can be compelled to share its facilities with competitors. The legislative history of the Act, moreover, clearly reveals Congress's reliance on essential facilities principles in adopting the unbundling requirement. *See* H.R. Rep. No. 104-204, at 49 (1995) ("In the overwhelming majority of markets today, because of their government-sanctioned-monopoly status, local providers maintain *bottleneck* control over the *essential facilities* needed for the provision of local telephone service . . . . The inability of other service providers to gain access to the local telephone companies[']equipment inhibits competition that could otherwise develop in the local exchange market.") (emphasis added)).

Consistent with the pro-competition policies of the antitrust laws generally, the essential facilities doctrine places significant limits on the ability of firms to gain compelled access to a competitor's facilities. The doctrine will compel the sharing of a facility only if, among other things: (i) the facility is essential to competition and (ii) the facility is not practically or reasonably available from another source. *See* 3A Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW 202 (1996) ("Areeda & Hovenkamp, ANTITRUST LAW") ("The term 'essential' in the essential facilities context refers to two different things, both of which must be established. First, the claimed input must be essential to the plaintiff's survival in the market. Second, the claimed input must not be available from another source or capable of being duplicated by the plaintiff

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Supreme Court] and other federal courts and that it expected its enactment to be interpreted in conformity with them"); *Morse v. Republican Party of Va.*, 517 U.S. 186, 230-31 (1996) (interpreter of statute must look to "'backdrop' of decisions" against which "Congress acted").

or others."); Philip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 852 (1989) (facility is "essential" only when access to it is "critical to the [competitor's] competitive vitality," which "means that the [competitor] cannot compete effectively without it and that duplication or practical alternatives are not available").[9]

Competition law limits the compelled sharing of facilities to this narrow set of circumstances because, as recognized by leading economists and antitrust commentators like Professors Kahn and Areeda, as well as by Justice Breyer in his concurrence in *Iowa Utilities Board,* sharing requirements significantly diminish the incentives for both competitors and incumbents to innovate through investment in their own facilities.[10] Since it is risky for CLECs

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[9] We do not mean to suggest that the Act requires the Commission to apply every aspect of the judicially developed essential facilities doctrine. For example, one element of an essential facilities claim under § 2 of the Sherman Act is exclusionary conduct, including an unreasonable denial of the use of the facility. *See, e.g. Caribbean Broadcasting System v. Cable & Wireless, PLC*, 148 F.3d 1080, 1088 (D.C. Cir. 1998); *MCI Comms. Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1983). By imposing a statutory unbundling obligation in section 251, the Act obviates any need for the Commission to apply this exclusionary conduct element of the essentials facilities doctrine.

[10] *See Iowa Utils. Bd.*, 119 S. Ct. at 753 (Breyer, J., concurring in relevant part) ("Increased sharing, by itself, does not mean increased competition. It is in the *un*shared, not the shared, portions of the enterprise that meaningful competition would likely emerge") (emphasis in original); Kahn Declaration at 4 (because "competition and innovation themselves consist in a quest for differential advantage, a requirement that the benefits be shared, on regulatorily dictated terms, in the cases in which that quest has been successful would interfere with the competitive process itself"); Areeda & Hovenkamp, ANTITRUST LAW at 174 ("the right to share a monopoly discourages firms from developing their own alternative inputs"); David S. Evans & Richard Schmalensee, *Economic Aspects of Payment Card Systems and Antitrust Policy Toward Joint Ventures*, 63 ANTITRUST L.J. 861, 878 (1995) ("[I]t makes economic sense to require a firm to share its property only when that property [is] a natural monopoly or bottleneck facility that is essential for competing firms to participate effectively in the market. Even in that situation we need to take very seriously the adverse effects of compulsory sharing on incentives to invest and innovate in both the affected market and throughout the economy. If other firms could have

to deploy their own substitute network elements, the safe and easy course, from the perspective of a new entrant, is to avoid that risk by relying entirely on ILEC elements. This inclination to free ride is compounded if these elements are made available -- as they would be under the Commission's existing rules -- on a recombined basis at TELRIC prices that purport to reflect the most efficient possible network.[11] Thus, as Professor Kahn concludes, "the obligation to share whatever elements competitors demand," coupled with the Commission's "prescription of a price purportedly equal to the minimum costs that would be incurred by an efficient supplier," "completes the process of *destroying the incentive to innovate.*" Kahn Declaration at 16 (emphasis in original).

Imposing mandatory sharing requirements when substitutes are available also undermines the investment incentives of existing players in the market. CLECs who have *already* deployed their own facilities will be severely hampered in their ability to compete if other CLECs can secure the same facilities from the ILEC at lower regulated prices. Because a sharing requirement will lower the returns these firms reasonably expected to receive on their investments, their incentive to continue to invest in competitive facilities would be severely diminished.[12] Likewise,

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developed, or could still develop, similar property, . . . the firm in question should not be required to share its property.").

[11] *See* Areeda & Hovenkamp, ANTITRUST LAW at 175 ("If the court goes the second step, ordering the defendant to provide the facility and regulating the price to competitive levels, then the plaintiff's incentive to build an alternative facility is destroyed altogether.").

[12] Kahn Declaration at 8 (overbroad sharing requirements risk "discourage new, risky investment" by "*existing* facilities-based CLECs, which have already invested billions of dollars of their own capital in challenging the historical monopolists and are investing more each year") (emphasis in original).